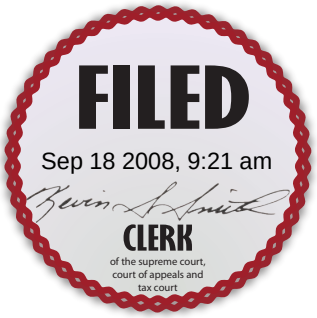

ATTORNEY FOR APPELLANT:

THEODORE J. MINCH
Sovich Minch, LLP
McCordsville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DEWAYNE EASLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0707-CR-638
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Commissioner
Cause No. 49G23-0507-FA-128411

September 18, 2008

OPINION ON REHEARING - NOT FOR PUBLICATION

BROWN, Judge

Dwayne Easley has filed a petition for rehearing asking that we reconsider our holding that the evidence was sufficient to sustain his convictions for dealing in cocaine as a class A felony, possession of cocaine and a firearm as a class C felony, possession of cocaine as a class C felony, possession of marijuana as a class A misdemeanor, and resisting law enforcement as a class A misdemeanor. Easley v. State, No. 49A02-0707-CR-638 (Ind. Ct. App. June 30, 2008). Specifically, Easley argues that the State failed to prove that the substances were cocaine and marijuana under scientific standards announced in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993).

Easley raised this same issue in his appellant's brief. We held, first, that Easley had waived the issue by failing to object to the forensic chemist's testimony regarding the testing she performed, the final identifications of the substances, and the weights of each substance. Easley, No. 49A02-0707-CR-638, slip op. at 6. Waiver notwithstanding, we held that the chemist's testimony was sufficient to establish the identity of the substances. Id. at 6-7. Specifically, we held that the State was not required to prove each of the Daubert factors and that the identity of a drug can be proven by circumstantial evidence. Id. at 7.

On rehearing, Easley again argues that the State was required to prove each of the Daubert factors and that our opinion "has relegated Daubert and West [v. State, 805 N.E.2d 909, 912-913 (Ind. Ct. App. 2004), trans. denied] to mere dicta and only 'advisory' as to the standards that should be used to determine the admissibility of

scientific evidence." Petition for Reh'g at 4. We note that, unlike here, the defendant in West objected at the trial to the reliability of the test in question, and on appeal, this court considered the Daubert factors. However, the Indiana Supreme Court has repeatedly held that "[t]he concerns driving Daubert coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved." Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003). "When analyzing Indiana Evidence Rule 702(b), we find Daubert helpful, but not controlling." Id.; see also McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997). Thus, Easley's rehearing argument fails.

Moreover, as noted in our memorandum opinion, the identity of a drug can be proven by circumstantial evidence. Easley, No. 49A02-0707-CR-638, slip op. at 7 (citing Halsema v. State, 823 N.E.2d 668, 673 n.1 (Ind. 2005)). In Halsema, the Indiana Supreme Court held that the evidence was sufficient where an investigating officer testified that he had received special training in the production, manufacture and distribution of methamphetamine and identified a substance retrieved from the defendant's drawer as methamphetamine. 823 N.E.2d at 673 n.1. Similarly, here, the forensic chemist testified, without objection by Easley, regarding preliminary tests that she performed and additional tests that she performed to obtain a final identification of the substances. This evidence was sufficient to establish the identity of the cocaine and marijuana. See, e.g., id.

Although we grant rehearing, we affirm our original memorandum decision in all respects.

DARDEN, J. and NAJAM, J. concur